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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues	)	CS Docket No. 99-363

To: The Commission

REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION

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SUMMARY

EchoStar Satellite Corporation ("EchoStar") hereby submits its reply comments in this important proceeding to implement the bad faith and exclusive dealing prohibitions that the Commission must impose on broadcasters negotiating local-into-local retransmission consent with satellite carriers under the Satellite Home Viewer Improvement Act of 1999.[1] At the outset, EchoStar notes with grave concern that some of the comments submitted in this proceeding by the National Association of Broadcasters ("NAB") appear themselves to demonstrate a very strong inclination on the part of broadcasters to act in disregard for the good faith mandate of the statute, further reinforcing the need for the Commission to impose rules with teeth in implementation of that mandate. The NAB's defiant stance confirms, if there was any doubt, that this is not an area where the Commission can rely on any "good-Samaritan" incentive of the regulated entities to do the right thing, but rather is an area calling for decisive action to promulgate concrete rules and enforce them aggressively.

These concerns grow, among other things, out of the fact that the NAB evidently views the statutory good faith requirement as a meaningless, "largely hortatory" provision that is incapable of being implemented. Under the statute, the Commission "shall" "prohibit a television broadcast station . . . from engaging in exclusive contracts for carriage or failing to negotiate in good faith . . . ."[2] There is nothing hortatory about this provision. When Congress

[1] Act of Nov. 29, 1999, PL 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), codified in scattered sections of 17 and 47 U.S.C.

[2] SHVIA, § 1002 (to be codified at 47 U.S.C. § 325(b)) (emphasis supplied).

says "prohibit," it means it – indeed, there is no more explicit way for Congress to establish a prohibition than by using the words "shall" and "prohibit." Nevertheless, the NAB argues that the statutory requirement should not be implemented because it is in its view "essentially impossible" to implement.[3] This is nothing less than a call for the Commission to abdicate its statutory responsibility based on what is described by the NAB as "the extraordinary – indeed, usually insuperable – difficulty of implementing an obligation to negotiate in good faith." Again, however, when Congress imposes an obligation, it must have deemed it capable of being carried out, and it is insulting for the NAB to try to negate congressional intent on grounds of "impossibility." Moreover, if a good faith requirement is generally amorphous, this only makes more acute the need for the agency charged with implementing it to enact concrete, specific rules.

While difficulty would be an improper excuse for failing to implement the statute, the Commission's work is in fact not nearly as difficult as the broadcasters portray it: the NAB makes too little of the fact that the Commission has available to it clear statutory guidance giving specific content to the good faith requirement. Under the statute, differences in terms are not a failure of good faith only so long as they are based on competitive marketplace considerations, meaning clearly that the Commission should find such a failure where a demand for different terms is not based on such considerations. This particular good faith requirement is therefore more specifically defined by Congress here than in most agreements to negotiate in good faith,

[3] *See* NAB Comments at 6 ("And in each such exercise, the Commission will be called on to do what courts have found to be essentially impossible: deciding when a party in a normal commercial negotiation – despite strong business reasons to want to make a deal has failed to bargain in good faith.").

by reference to the term "competitive marketplace considerations." The Commission must give concrete content to that term.

The NAB tries, again, to negate the competitive marketplace considerations standard. It essentially presses on the Commission the rule "if we demand it, then it must be based on competitive marketplace considerations," based on the vacuous assertion that the broadcasters too have an incentive to reach a deal, and the argument that the market is competitive. Absurdly, the broadcasters try to prove that point by arguing that the market power of cable operators has been lessened by competition from satellite carriers. Ironically, if that were true, it would mean only that the networks now have even *more* bargaining power than before. Regardless of whether the market power of cable operators has lessened (EchoStar believes it has not), the networks' power can only increase with the ability to "whipsaw" one distributor against the other.

In aid of its task of defining what does and does not constitute competitive marketplace considerations, the Commission should indeed look to the retransmission marketplace, where the cable operators have received retransmission consent in exchange for minimal consideration and without making any cash payment, consistent with the Copyright Office's determination that competitive marketplace considerations point to a zero market value for local-into-local retransmissions. Moreover, several factors support the view that, in a competitive marketplace, broadcasters should on balance be willing to grant their retransmission consent to satellite distributors on even better terms than those enjoyed by cable operators.[4] In

[4] The broadcasters try to bolster their demand for onerous terms by arguing that EchoStar and DIRECTV charge consumers for local signals. That fact is not probative of the value of retransmission consent for several reasons. ***First,*** most of the consumers subscribing to local signals are generally presumed under existing Grade B standards to receive these signals

(Continued ...)

light of these facts, any attempt by broadcasters to extract more onerous terms than the norm established in myriad retransmission deals with cable operators should be viewed as presumptively not based on competitive marketplace considerations. Also, attempts at extracting value by tying retransmission to carriage of other broadcast signals (including digital signals) should be regarded as *per se* violations of the good faith obligation.

The NAB also exhibits the broadcasters' inclination to disregard the good faith mandate if left unguided by the Commission when it tries to stake out the broadcasters' ability to deny EchoStar *local-into-local* retransmission consent on the ground that EchoStar and the broadcasters are currently involved in copyright litigation over the retransmission of distant signals. The Commission should leave no doubt at all that such behavior would be a blatant refusal to deal that trumps the congressional directive and violates the core of the prohibitions on bad faith and exclusive dealing.

Such a denial of consent is not consistent with good faith negotiations for several reasons: ***first,*** it ties the question of local-into-local retransmission to distant signal retransmissions in a way not intended by Congress. Congress – which was fully aware of the litigation between EchoStar and the broadcasters pending in Miami – has prescribed carefully

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off the air. The only reason why these consumers purchase a satellite carrier's local signal offering is for value that the satellite carrier creates – far better signal quality, no need for an off-air antenna. There is no basis for the broadcaster to receive any part of that value. Moreover, ***second,*** consumers within a local Designated Market Area ("DMA") are already counted for purposes of determining the audience that a local broadcaster can deliver to advertisers and the compensation to be received by the broadcaster – one of the reasons why the Copyright Office has concluded that the market value of local-into-local retransmissions is zero. ***Third,*** the cable systems' charges for "lifeline" cable (essentially the broadcast channels) are higher ($10 dollars or more), even as cable operators throughout the country have received retransmission consent for no cash payment and at very little cost.

defined forms of redress for retransmissions that violate the "unserved household" limitation of Section 119's distant signal license. Self-help by the broadcasters through a denial of local-into-local retransmission consent is not one of these types of redress. The broadcasters should not be allowed to take the law in their hands and, in the process, negate the congressional intent to at last allow local-into-local retransmissions. ***Second,*** courts have frequently found instances of bad faith in exactly such behavior – attempts to walk out of a deal based on a pending dispute. ***Third,*** the Commission should perform its statutory duty as the courts perform their respective duties, and there is no basis in the statute for allowing the Commission to stay its hand in carrying out its obligations. In that respect, the Cable Services Bureau's decision in *Speedvision* would be inapposite even if it were correct.[5] ***Fourth,*** there is no economic justification for the broadcasters to deny local-into-local retransmission based on their allegation that a satellite carrier has violated the limitations of the distant signal copyright license. If anything, local-into-local retransmissions lessen a consumer's interest in receiving distant network signals. Indeed, for years, the broadcasters have been arguing that, instead of revising the antiquated standard for defining which households are eligible to receive distant retransmission and increasing the number of eligible households, Congress should allow local-into-local retransmissions. For broadcasters to now deny their consent to local-into-local retransmissions based on their

[5] That case would be more comparable if there were a retransmission consent agreement between a broadcaster and a satellite carrier, and the broadcaster had filed a breach of contract action alleging violations of that contract while the satellite carrier had filed a retransmission complaint with the FCC. Even if that were the case, the Commission should resist any attempt by a broadcaster to stall its determinations by inventing a contractual dispute, and the Bureau's decision in *Speedvision* was significantly flawed in that respect. In any event, the broadcasters cannot cite *Speedvision* in the present fundamentally different circumstances as a vehicle for using any federal court litigation to delay the Commission's adjudication of their conduct in the area of local-into-local retransmissions.

purported concerns with distant retransmissions would turn that prior position on its head and would be an example of disparity in treatment that is not based on competitive marketplace considerations.

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1 Act of Nov. 29, 1999, PL 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), codified in scattered sections of 17 and 47 U.S.C.

I. SECTION 325(B)'S GOOD FAITH REQUIREMENT MUST BE AGGRESSIVELY IMPLEMENTED BY CONCRETE RULES

Section 325(b)'s good faith requirement must be aggressively implemented by objectively and specifically defining "good faith." The need for concrete rules is especially acute because some of the comments made by broadcasters in this proceeding indicate a disconcerting inclination to act with complete disregard for the congressional good faith mandate if left unguided by the Commission. Specifically, some broadcasters appear to take the defiant position that the statutory requirement of good faith dealing effectively amounts to nothing. They argue that the requirement is in fact not a requirement at all, but rather a "largely hortatory" provision, because the term good faith is too "amorphous" and "nebulous" to define, and the statute does not provide the FCC with sufficient guidance to establish objective, specific criteria.[2] In fact, there is no mistaking Congress's intent for a mere hortatory admonition – under the statute, the Commission "shall" "prohibit" bad faith negotiation. The broadcasters' view that implementation of that provision would be hard work is a pathetically flimsy basis for their suggestion that the Commission abdicate its statutory duty. Nor is that task nearly as Herculean as the broadcasters suggest. Congress has provided valuable assistance by directing the Commission to implement Section 325(b)'s "good faith" requirement in a manner consistent with competitive marketplace considerations.

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[2] Comments of NAB, 6-8; Comments of The Walt Disney Company ("Disney"), 1-8; Joint Comments of the ABC, CBS, FOX, and NBC Television Network Affiliate Association ("Joint Comments ABC, et al."), 4-6.

A. The Commission May Not Abstain from Implementing the Bad Faith Prohibition Because of a View That Implementation is Difficult

On reading the congressional language, no good faith observer would contend that the good faith provision is a mere advisory:

> The Commission ***shall*** . . . ***prohibit*** a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith . . .[3]

"Shall" and "prohibit" are never used by Congress to impart advice – indeed, there is no more explicit way for Congress to enact a mandatory prohibition than by using these words. In the face of this language, however, the NAB unflinchingly describes the provision as "largely hortatory,"[4] suggesting an inclination on the part of the broadcasters to flout what they view as mere exhortation, unless the Commission gives them guidance by enacting concrete rules.

The broadcasters urge the Commission to simply "stand back," "allow the marketplace to work freely,"[5] and refrain from promulgating such rules, because Section 325(b)'s good faith requirement is simply too nebulous to effectively implement.[6] According to the NAB, "the extraordinary – indeed, usually insuperable – difficulty of implementing an obligation to negotiate in good faith" is reason enough for the Commission to do nothing.[7] For

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3 SHVIA, § 1002 (to be codified at 47 U.S.C. § 325(b)) (emphasis supplied).

4 NAB Comments at 16.

5 Joint Comments of ABC, et al., 16.

6 Comments of NAB, 6-8.

7 Comments of NAB, 6.

its part, Disney argues that Congress "deliberately imposed no requirements relating to the terms of the deals themselves."[8] Therefore, these commenters argue, the Commission should refrain from attempting to substantively implement Section 325(b)'s good faith requirement. Otherwise, each retransmission consent negotiation could easily become the subject of costly, complex litigation.

The amorphous nature of the term "good faith" in the abstract is simply not a reason for the Commission to take a hands-off approach. To the contrary, it is precisely the reason why the Commission must add specificity to the requirement, using the two-tiered approach proposed in the NPRM. It is only such specificity, tailored to meet the particular characteristics of the retransmission consent marketplace, that can provide parties with the certainty that alone would obviate the need for countless complaint proceedings.

Nor is the fact that Congress did not establish a highly detailed approach to regulating retransmission consent in the statute itself tantamount to a congressional decision that a detailed approach is unnecessary – much less unauthorized.[9] Rather, it indicates a Congressional decision to defer to the expertise of the Commission. Far from being unusual, such deference is the typical way in which Congress and administrative agencies work together to enact and implement laws.

The three good faith rules that the NAB does come up with are so woefully insufficient that they suggest an attempt by the NAB to "bracket" the issue by staking out an extreme position in hopes that the Commission will be lured into striking some "middle" ground

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[8] Comments of Disney, 1.

[9] Comments of NAB, 16.

that will itself be woefully insufficient. No bad faith actor would be so inept or so artless as to display its bad faith by not agreeing to a convenient time and place to meet, not appointing a representative to negotiate, and not committing to writing a retransmission agreement once a deal has been reached.[10] The respective "prohibitions" suggested by the broadcasters are a travesty, and do not provide the Commission with any real help in implementing the bad faith prohibition.

B. The Commission Can and Must Follow Congressional Guidelines in Implementing Section 325(b)

Nor is the task of implementing this particular good faith requirement nearly as difficult as the broadcasters suggest. While good faith may be amorphous in the abstract, courts discussing good faith have consistently held what should be obvious – a good faith obligation takes its contours from the document establishing it, whether it be a contract or (as here) the authoritative word of Congress.[11] In that respect, Section 325(b) already gives significant definition to this particular good faith obligation by stating that differences in terms are not a

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[10] Comments of NAB, 21; Comments of Disney, 7; Joint Comments of ABC, et al., 15.

[11] *See A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc.*, 873 F.2d 155, 158 (7th Cir. 1989) ("The full extent of a party's duty to negotiate in good faith can only be determined, however, from the terms of the letter of intent itself."); *Milex Products, Inc. v. ALRA Laboratories, Inc.*, 603 N.E. 2d 1226, 1234 (Ill. App. Ct. 1992); *Channel Home Centers v. Grossman*, 795 F.2d 291, 291 (3d Cir. 1986) (holding that an agreement to negotiate in good faith binds the parties to the terms of the agreement, provided the terms are "sufficiently definite to be enforced"); *Chase v. Consolidated Foods Corp.*, 744 F.2d 566, 571 (7th Cir. 1984) (finding that an agreement to negotiate in good faith constitutes a binding, enforceable contract if that is what the parties intended); *Itek Corp. v. Chicago Aerial Industries, Inc.*, 248 A.2d 625, 629 (Del. 1968) (holding that parties who intentionally obligated themselves to "make every reasonable effort to agree upon a formal contract" were bound to "attempt in good faith to reach final and formal agreement" and could not sever negotiations simply to obtain a better deal from a third party).

violation of the good faith requirement so long as they are based on competitive marketplace considerations – a qualification that makes Section 325(b)'s good faith requirement significantly more specific than most agreements to negotiate in good faith. This is precisely the type of guidance in the Commission's effort to give concrete content to the provision that the NAB and others asserts is lacking from the statute. It is thus incumbent on the Commission to specifically define good faith and to do so by determining what is – and what is not – a competitive marketplace consideration.

As with "good faith," the broadcasters try to write the "competitive marketplace considerations" criterion out of the statute, by essentially pressing on the Commission the rule "if we demand it, then it must be based on competitive marketplace considerations." This rule rests on the NAB's worthless assurance that broadcasters have an incentive to give retransmission consent – *ergo*, according to the NAB, the broadcasters' desire to reach a deal will ensure sufficient self-discipline on their demands and prevent these demands from becoming overreaching, creating a marketplace-driven self-policing mechanism that obviates any oversight by the Commission. Underlying that line of argument are the broadcasters' assertions that trusting the marketplace was the congressional intent, and that the marketplace is competitive.

The NAB supports its view of the Congressional intent by argument based on free-association and wordplay: because Congress used the phrase "competitive *marketplace* considerations" to define which disparities in terms of retransmission would be legitimate, it follows that Congress intended the Commission to leave policing of the bad faith prohibition to the marketplace. According to the broadcasters, Congress' express "desire for a competitive marketplace counsels in favor of only limited regulatory interference with free market negotiations."[12]

Conveniently, the NAB equates "free market" with "competitive market." However, as both Congress and the Commission know, the two terms are not always equivalent. If Congress believed that the workings of the marketplace would automatically guarantee competitive marketplace considerations without need for regulatory intervention, it would not have needed to enact a compulsory copyright license, it would not have imposed a good faith requirement on retransmission negotiations, and it would certainly not have needed to lay down a "competitive marketplace considerations" criterion. A congressional "desire" to allow disparities in the terms of retransmission based on competitive marketplace considerations does not amount to a belief that a competitive marketplace exists, but rather sets the standard for determining which term disparities are legitimate and which are not. In establishing that standard, Congress made it the Commission's express responsibility to clearly delineate rules to ensure that a "free market" retransmission consent negotiation is, in fact, competitive, and not anti-competitive in nature.

The NAB next tries to prove that the retransmission marketplace is competitive in a curious and ultimately illogical fashion: it tries to rely on the "existence of multiple buyers."[13] Of course, the existence of many buyers and only one or a few sellers is the hallmark of a monopoly or oligopoly respectively. There are only 4 established sources of broadcast network

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12 Comments of NAB, 17.

13 *See* NAB Comments at 18 ("the existence of multiple buyers is obviously a very important 'competitive marketplace consideration.'").

programming in the nation, and indeed the struggle of companies as strong as Time Warner and Paramount to establish a fifth and sixth network demonstrates the huge barriers to entry in this particular marketplace. On the buyer side, the higher the number of buyers, the greater the market power of the sellers and the more formidable their ability to whipsaw buyers against one another. It is therefore mind-boggling that the NAB would rely on the multiplicity of buyers in support of its assertion that the marketplace is competitive.

The NAB goes on to argue that the marketplace has become more competitive because the dominance of cable operators has been undermined by competition from satellite carriers.[14] By the same token, however, even if this were true (the Commission found only a few days ago that the cable operators' dominance persists),[15] it would only increase the networks' ability to play off one MVPD distributor against another in retransmission negotiations. It is this ability that Congress sought to restrain by imposing a good faith requirement on the broadcast stations (and by strictly prohibiting exclusivity agreements). EchoStar cannot comprehend how such a further increase in the seller's power could suggest a more competitive marketplace and support the broadcasters' request that the Commission leave it to the market to sort retransmission deals out.

In fact, of course, far from being competitive, the retransmission marketplace is distorted by several anti-competitive considerations relating to the market (oligopoly) power of the broadcast networks and the market (oligopsony) power of the cable operators against which

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14 Comments of NAB, 17-19.

15 *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, CS Docket No. 99-230, ¶ 4 (rel. Jan. 14, 2000).

satellite carriers have to compete. The marketplace is rife with the possibility for anti-competitive conduct.

Regrettably, proof that the broadcasters' conduct may well be based on anti-competitive considerations is conspicuously present in the broadcasters' pleadings themselves. As will be discussed in greater detail below, the broadcasters are trying to reserve the ability to deny EchoStar their local-into-local retransmission consent based on their distant signal dispute with EchoStar pending in federal court in Miami. That denial is not based on competitive marketplace considerations because, if anything, local-in-local retransmission may reduce consumer interest in distant signals and correspondingly also lessen broadcasters' distant signal-related concerns. While this attempt should be nipped in the bud by the Commission, it also shows that this is not an area where the Commission can appropriately rely on any "good-Samaritan" incentives of the regulated entity. The broadcasters' inclinations point to the need to carefully define what does and does not constitute competitive marketplace considerations and vigilantly police broadcasters' conduct.

To that end, the Commission should adopt a standard including (1) a test based on a list of *per se* violations of good faith; and (2) a test based on a case-by-case evaluation of specific circumstances, aided by (3) presumptions based on actual marketplace experience and guiding the determination of what does, and does not, constitute "competitive marketplace considerations."

1. The Commission Must Specifically and Substantively Define What Does and What Does Not Constitute Competitive Marketplace Considerations

The experiences of the retransmission negotiations and deals with cable operators offer significant guidance in achieving this. These deals are probative of what would happen in a more competitive marketplace exactly because of the market power enjoyed by cable operators, which tends to balance out the power of the networks, replicating more closely a competitive marketplace composed of buyers and sellers of roughly equal power than in the case of negotiations between the networks and EchoStar. Moreover, these deals form an unmistakable norm – the cable operators have received retransmission in exchange for very little consideration and without having to make any cash payment even in a single reported case. This consistent pattern transcends isolated deals. Thus, while disparities between a broadcaster demand and one particular deal might or might not be dispositive of whether the difference is due to competitive marketplace considerations, demand for terms that are more onerous than the norm should create a strong presumption to that effect. That presumption is also consistent with the Copyright Office's recent and authoritative determination, based on reams of evidence, that the value of local-into-local retransmissions is zero, in light of the two-way benefits flowing from retransmission and the fact that local consumers are already counted for the purpose of determining a broadcast station's reach and the audience it can deliver to advertisers.[16] In its Comments, EchoStar has also suggested a balanced and equitable method for rebutting that

[16] *In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Report of the Copyright Arbitration Royalty Panel, 51-52 ("CARP Report"), adopted by the Copyright Royalty Tribunal, 47 FR 19052 (1992), affirmed by the Register of Copyrights, Copyright Office, 62 FR 55742 (1997) ("*Final Order*").

presumption – based on the competitive justifications that the Commission allows cable-affiliated programmers to prove in the program access area, with some necessary adjustments.

On the other hand, instances of bad faith may also be found in demands for consideration that a network may have extracted from cable operators. This is because, in a competitive marketplace, broadcasters should on balance be willing to grant their retransmission consent to satellite distributors on better terms than those enjoyed by cable operators. Several factors point to that conclusion: ***first,*** in a retransmission deal with a cable operator, the broadcaster's retransmission consent makes a cable system more attractive to local advertisers, which may now view cable as a more acceptable advertising outlet, resulting in potential loss of local advertising revenue for the local broadcast station. Diversion of local advertising revenue is not a risk involved in the broadcaster's granting retransmission consent to a satellite carrier.

Second, the grant of retransmission consent to a cable operator may induce many viewers that previously did not subscribe to any MVPD offering to buy cable and thus move from an environment of limited programming options (the broadcast stations) to one of many more options, resulting in a rating loss for the broadcaster. In the case of satellite retransmission on the other hand, any such risk would be much more limited: the vast majority of consumers that would become satellite subscribers because of the addition of local signals are expected to be cable subscribers moving to satellite from cable – *i.e.*, to one MVPD offering from another, and therefore not experiencing an increase in their viewing options from only broadcast to MVPD.

Third, the cost that needs to be incurred by the satellite operator to retransmit local signals is much greater than the cost incurred by a cable operator. To retransmit one local station to one market, EchoStar must dedicate one channel of nationwide satellite capacity. The satellite carrier's capacity expenditure is therefore many times that of the cable operator – it is as if AT&T, to take an example of a Multiple System Operator, had to vacate one channel of programming on all its systems nationwide in order to be able to retransmit the NBC Washington, D.C. affiliate in Washington, D.C. This higher cost suggests a different balance of costs and benefits and would point to a lower consideration for satellite retransmission in a truly competitive marketplace. That last factor is particularly significant: concessions such as the carriage of digital broadcast signals, which are almost costless for a cable operator, are so prohibitively costly as to be virtually impossible to accede to for a satellite carrier.

2. The Commission Must Not Accept Anti-Competitive Demands as Routine Bargaining Methods

In their Comments, the broadcast interests put the Commission on notice that they will try to extract excessive consideration and impose unreasonable tying demands on satellite carriers seeking retransmission consent – terms precisely of the type that in EchoStar's view should be prohibited either outright or presumptively, depending on the types of demand.

In support of the broadcasters' position, the NAB points to the fees charged by EchoStar and DIRECTV for local signals to indicate that such stations have significant value for satellite carriers and thus broadcasters should be free to demand that they receive a portion of that value as consideration and be free to withhold consent if they cannot obtain the deals they desire.[17] Such an argument, however, ignores the reality of the retransmission marketplace in several significant respects. ***First***, EchoStar and DIRECTV charge their local signal subscribers

[17] Comments of NAB, 14.

for value that they create, not value created by the broadcasters. Most of the consumers subscribing to local signals are generally presumed under existing Grade B standards to already receive these signals off the air. Thus, the only reason why these consumers purchase a satellite carrier's local signal offering is for value that the satellite carrier provides, including increased quality, convenience, and aesthetics (*i.e.*, lack of off-air antenna). There is absolutely no reason that television broadcast stations should expect to share in the revenues that are solely attributable to the value added to a television broadcast signal by a satellite carrier.

Second, consumers within a local DMA are already counted for purposes of determining the audience that a local broadcaster can deliver to advertisers and the compensation to be received by the broadcaster – one of the reasons why the Copyright Office has concluded that the market value of local-into-local retransmissions is zero. In other words, broadcasters have already been fully compensated, through advertising revenue, for the retransmitted signal. Any additional compensation would thus exceed the competitive market value of the programming.

Third, the cable systems' charges for "lifeline" cable (essentially the broadcast channels) are higher ($10 dollars or more), even as cable operators throughout the country have received retransmission consent for no cash payment and at very little cost.[18]

The NAB also points to statements by satellite carriers that local broadcast signals are essential to their competitiveness as an excuse to demand more compensation for their retransmission consent.[19] However, as EchoStar has already pointed out in its comments,

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[18] EchoStar notes that District Cablevision's charges $11.72 per month for its basic service.

[19] Comments of NAB, 12-13.

> the Commission should not confuse the market value of network retransmissions with the crucial importance of local network signals to satellite carriers. These signals are important because they are controlled by the networks and because they have so far been generally unavailable to satellite carriers, while their cable competitors have offered them having secured them at little or no cost. The resulting acute need of satellite distributors for those signals is consistent with the close to zero market value of a marginal unit of retransmission. By the same token, the fundamental importance of water (or indeed air) to life does not support a high market value, which in a competitive market is based on the cost of the last drop.[20]

In short, the Commission must stringently examine any broadcaster demands for compensation, and should permit such demands only if they are economically justified. In this regard, the Commission should look to the exceptions to the discrimination prohibitions of the program access rules. These exceptions specifically delineate those marketplace considerations that support differential terms and conditions for carriage in the program access context: (1) reasonable financial requirements; (2) actual and reasonable differences in costs; and (3) economies of scale.[21] At the same time, the Commission should adapt these exceptions with caution as opposed to adopting them wholesale. The implementation of the program access rules has been blunted by the very lack of enforcement teeth that, if tolerated here, would doom SHVIA to failure. One reason for the lax enforcement is the broad exceptions to the anti-discrimination rules. At a minimum the Commission should re-confirm and vigorously apply safeguards such as placing the burden of proof for such justifications squarely on the broadcasters, especially since there generally do not appear to be cost differences or economies of scale justifying different terms for satellite versus cable retransmissions.

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[20] Comments of EchoStar, 15.

[21] 47 C.F.R. § 76.1002(b)(1)-(3).

The Commission should also allow discovery as of right. The questions of disparity in terms and the presence or lack of competitive marketplace considerations are intensely factual. A practice of rarely permitting discovery, as in the program access area, might encourage broadcasters to discriminate with impunity and to disguise that behavior behind vague invocations of competitive marketplace considerations, without sufficient opportunity to test these assertions through the fact-finding process.

Demand for Tying Arrangements. The Commission should prohibit outright tying arrangements that require the carriage of other broadcast stations in the same or other local markets or the carriage of digital signals.[22] MVPD distributors, cable and satellite alike, agree that such tying arrangements cannot be economically justified and thus must be considered *per se* violations of Section 325(b)'s good faith requirement.[23]

The proposal to permit broadcasters to demand the carriage of other broadcast signals (including digital signals) in exchange for their retransmission consent would further augment the already excessive must-carry requirements of the SHVIA, and is particularly oppressive. As EchoStar explained in its Comments, the must-carry obligations do not extend to a local market that the satellite carrier has not decided to serve, and do not set in before 2002. Such carriage requirements would therefore be an attempt to exceed and rewrite those statutory obligations. As the American Cable Association correctly puts it, "tying digital broadcast carriage to analog retransmission consent is the broadcasting industry's jerry-rigged way to

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22 Comments of NAB, 25-28; Joint Comments of ABC, et al., 21.

23 Comments of EchoStar, 13; Comments of DIRECTV, 10; Comments of BellSouth Corporation, BellSouth Interactive Media Services, Inc., and BellSouth Wireless Cable, Inc. ("BellSouth"), 20; Comments of U S WEST, Inc. ("U S WEST"), 5-6.

achieve digital must-carry."[24] Additionally, by agreeing to carry the digital signals of a network's stations, a cable operator would be merely agreeing to add one channel to each of its systems. For a satellite carrier, on the other hand, the spectrum expenditure would be much more severe: each additional signal would require the dedication of cumulative nationwide capacity on EchoStar's nationwide system (thus, an additional channel for each of 10 cities would require 10 dedicated channels nationwide). While such a requirement might be acceptable to a cable system, it would be impossible to meet for a satellite operator. Accordingly, "the FCC can and should declare that any attempt by a broadcaster to impose non-optional tying arrangements on a competing MVPD in exchange for retransmission consent will be deemed a per se violation of the "good faith" requirement and shall be actionable as such."[25]

II. THE COMMISSION MUST NOT COUNTENANCE REFUSALS TO DEAL UNDER ANY PRETEXT

The most disconcerting sign of an inclination on the part of the broadcasters to disregard the good faith mandate if left unguided by the Commission is found in the NAB's effort to stake out the broadcasters' ability to deny EchoStar *local-into-local* retransmission consent on the ground that EchoStar and the broadcasters are currently involved in copyright litigation over the retransmission of *distant* signals. In particular, the NAB alleges (without of course offering any proof) that "EchoStar is today violating the rights of hundreds of local broadcast stations by illegally delivering distant network signals to thousands of ineligible

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24 Comments of American Cable Association, 8-9

25 Comments of U S WEST, 5-6. *See also* Comments of BellSouth at 13-18.

subscribers in many markets,[26] and continues" that "[i]t is natural for a company whose rights are being violated to ask that the violations stop before it will enter into a new transaction with the transgressor."[27] EchoStar has refuted, and will continue to refute, these incendiary allegations in the federal district court in Florida, and will not dignify them by rebutting them in this forum where they do not belong. The broadcasters should not be allowed to use the distant signals litigation as a pretext for denying EchoStar retransmission consent. The Commission should leave no doubt at all that such behavior would be a blatant refusal to deal that trumps the congressional directive and violates the core of the prohibitions on bad faith and exclusive dealing.

Such a denial of consent is not consistent with good faith negotiations for several reasons: ***first,*** it ties the question of local-into-local retransmission to distant signal retransmissions in a way not intended by Congress. Congress – which was fully aware of the litigation between EchoStar and the broadcasters pending in Miami – has prescribed carefully defined forms of redress of retransmissions that violate the "unserved household" limitation in Section 119's distant signal license. Self-help by the broadcasters through a denial of local-into-local retransmission consent is not one of these types of redress. The broadcasters should not be allowed to take the law in their hands and, in the process, negate the congressional intent to at last allow local-into-local retransmissions. NAB is essentially asking the Commission to give broadcasters anti-competitive leverage of satellite carriers. By manufacturing a dispute, a broadcaster could essentially refuse to deal with any given carrier.

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26 Comments of NAB, 23.

27 *Id.*

Second, courts have frequently found instances of bad faith in similarly ill-suited behavior. For instance, in the employment area, the courts have recognized that "[w]hen an employer chooses one opening position and thereafter refuses to bargain, **or creates non-issues simply for the purpose of forestalling agreement**[,]" the employer is guilty of bad faith bargaining.[28]

Third, the Commission should perform its statutory duty as the courts perform their respective duties, and there is no basis in the statute allowing the Commission to stay its hand in carrying out its obligations. In that respect, the Cable Services Bureau's decision in *Speedvision* cited by the NAB analogous authority would in fact be inapposite in these proceedings even if it were correct.[29] That case would be more comparable if there were a retransmission consent agreement between a broadcaster and a satellite carrier, and the broadcaster had filed a breach of contract action alleging violations of that contract while the satellite carrier had filed a retransmission complaint with the FCC. Even if that were the case, the Commission should resist an attempt to stall its determinations by inventing a contractual

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[28] *N.L.R.B. v. Pratt & Whitney Air Craft Division, United Technologies Corp.*, 789 F.2d 121, 136 (2nd Cir. 1986) (emphasis added). *See also N.L.R.B. v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969) (employer found guilty of failure to negotiate in good faith and unfair labor practices where employer undertook a "take it or leave it" approach to union negotiations); *Milex Products, Inc. v. ALRA Laboratories, Inc.*, 603 N.E. 2d 1226, 1234 (Ill. App. Ct. 1992) ("[A] party might breach its obligation to bargain in good faith by unreasonably insisting on a condition . . . where such insistence is a thinly disguised pretext for scotching the deal . . ."); *General Athletic Products Co.*, Case 8-CA-9548, 227 NLRB 1565, 1574 (NLRB 1977) (noting that bad faith can be evidenced by "various acts and omissions . . . [which] demonstrate a basic disposition . . . to avoid [an] obligation to bargain with the aim of reaching an agreement").

[29] *See* NAB Comments at 24; *In the Matter of EchoStar Communications Corporation v. Speedvision Network, L.L.C.; Outdoor Life Network, L.L.C. Program Access Complaint*, 14 FCC Rcd. 9327 (1999).

dispute, and the Bureau's decision in *Speedvision* was fundamentally flawed in that respect. In any event, *Speedvision* presents fundamentally different circumstances (there is here no contract or contractual dispute), and the broadcasters cannot appropriately invoke it as a vehicle for using any federal court litigation to delay the Commission's adjudication of their conduct in the area of local-into-local retransmissions.

Fourth, there is no economic justification for the broadcasters to deny local-into-local retransmission based on their allegation that a satellite carrier has violated the limitations of the distant signal copyright license. If anything, local-into-local retransmissions lessen a consumer's interest in receiving distant network signals. Indeed, for years, the broadcasters have been arguing that, instead of revising the antiquated standard for defining which households are eligible to receive distant retransmission and increasing the number of eligible households, Congress should allow local-into-local retransmissions. In its pleadings in the Commission's Grade B rulemaking proceeding, the NAB trumpeted only a year ago its view that "local-to-local delivery of network stations, and effective use of over-the-air antennas, not an attack on localism, is the proper solution."[30] The NAB argued that:

> If Congress creates an appropriate statutory and regulatory regime, satellite companies will be able to compete with cable systems by offering <u>local</u> broadcast stations – not distant ones – to local viewers, just as cable systems do . . . **The local-to-local solution,**

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[30] *See In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity*, Reply Comments of the National Association of Broadcasters, CS Docket No. 98-201 (filed Dec. 21, 1998) at ii.

> **if properly implemented, is a win/win situation for satellite companies, broadcasters, and consumers.**[31]

With regard to EchoStar in particular, the NAB stated:

> Prospects for a successful local-to-local solution have also been brightened by EchoStar's recent announcement that it is acquiring a vast amount of new satellite capacity. With hundreds of new channels at its disposal, EchoStar could offer local-to-local service to a large percentage of American television households.[32]

Thus, for broadcasters to now deny their consent to local-into-local retransmissions based on their purported concerns with distant retransmissions would turn that prior position on its head and would be an example of disparity in treatment that is not based on competitive marketplace considerations.[33]

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[31] *In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity*, Comments of the National Association of Broadcasters, CS Docket No. 98-201 (filed Dec. 11, 1998) at 51 (emphasis added); *see also In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity*, Reply Comments of the National Association of Broadcasters, CS Docket No. 98-201 (filed Dec. 21, 1998) at 53, 55-56 (the Commission's Report on Competition in Video Markets "confirms that local-to-local satellite delivery, along with more aggressive use of existing and improved over-the-air antenna technology, will largely solve whatever remaining problems may exist relating to delivery of network programming to dish owners . . . . the Commission should recommend that Congress act quickly to approve an appropriate statutory and regulatory regime for local-to-local delivery of broadcast stations by satellite companies.").

[32] Comments of the National Association of Broadcasters (filed Dec. 11, 1998) at 51.

[33] In light of the apparent effort of broadcasters to deny retransmission consent based on disputes with an MVPD, EchoStar also agrees with U S WEST's suggestion that "to ensure that competing MVPDs and their customers suffer no unwarranted disruptions of service pending resolution of retransmission consent disputes, the Commission should prohibit a broadcaster from withdrawing any existing retransmission consent given to an MVPD unless and until the MVPD's exclusivity/good faith complaint is denied by the Cable Services Bureau and, if reconsideration is requested, the full Commission." Comments of U S WEST, 8-9.

III. THE COMMISSION MUST PROHIBIT TELEVISION BROADCAST STATIONS FROM ENGAGING IN EXCLUSIVE DEALING, WHETHER *DE FACTO* OR *DE JURE*

As EchoStar argued in its comments, the prohibition on exclusive dealing should extend beyond *de jure* to *de facto* exclusivity, consistent with the broad statutory language ("engaging" rather than "entering") and with the fact that a narrow prohibition on *de jure* exclusivity would be easy to circumvent and ultimately meaningless. Contrary to the view expressed by the network affiliates,[34] a complainant should not be required to prove exclusivity by demonstrating the existence of an exclusivity provision in an existing agreement. It is absurd to suggest that exclusivity is only present and therefore deserving regulation if and when it is embodied in a document explicitly identifying it by name.

To avoid circumvention of its rules, the Commission must not hesitate to cast a wide net in determining which behavior is tantamount to *de facto* exclusive dealing. EchoStar agrees with the American Cable Association that *de facto* exclusivity agreements occur, for example, when broadcasters are allowed to impose unaffordable demands on smaller businesses,[35] or any business with which the broadcaster may have little or no interest in dealing. Broadcasters must not be rewarded for heightened levels of creativity and cleverness in circumventing the exclusivity prohibition with pricing schemes or incentives.

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[34] Joint Comments of ABC, et al., 27.

[35] Comments of American Cable Association at 14-15.

IV. THE ACT MUST NOT BE CONSTRUED TO DIVEST THE COMMISSION OF ITS JURISDICTION OVER EXCLUSIVE RETRANSMISSION CONSENT AGREEMENTS AFTER JANUARY 1, 2006

Section 325(b) of the Communications Act directs the Commission to initiate a rulemaking proceeding that will "until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts."[36] While this means that the Commission is under an explicit ***obligation*** to prohibit exclusivity ***until*** that date, nothing in the statute can be read to divest the Commission of its authority to continue to do so after that date. EchoStar agrees with the Wireless Communications Association International, Inc. ("WCA") that there is nothing in the legislative history of the SHVIA which suggests that Congress sought to repeal the Commission's authority to regulate such agreements.[37] Indeed, the Commission has had in place a prohibition on exclusive retransmission consent deals since before the enactment of the SHVIA and without need for a statutory provision required such a prohibition. *See* 47 C.F.R. § 76.64(m).

The Commission's authority over exclusive retransmission consent agreements beyond January 1, 2006 is vital to ensuring the promotion of competition with cable. In particular, Echostar concurs with BellSouth that, in the absence of Commission authority over these agreements, incumbent cable operators would "eviscerate competition by entering into exclusive retransmission consent agreements that deny their competitors full and fair access to

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[36] S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, Section 1009(a)(2)(C)(ii) at 46.

[37] Comments of WCA, 5-11.

broadcast programming."[38] Thus, as indicated by Local TV on Satellite, LLC, "[t]he Commission may and should extend the prohibition beyond the minimum period because the prohibition will continue to be necessary to foster competition and diversity in the MVPD market, which is precisely the intent of the 1999 SHVIA."[39]

V. THE COMMISSION MUST NOT ERECT PROCEDURAL BARRIERS TO RESOLUTION OF RETRANSMISSION CONSENT COMPLAINTS

The Commission must not erect barriers procedural to the resolution of retransmission consent complaints. Clearly, this is what broadcasters seek to do in this proceeding. In particular, NAB and others argues that the Commission should put the entire burden of proof on a complainant alleging a violation of Section 325(b).[40] Such an one-sided allocation of the burden of proof is entirely unreasonable, and, as with so many of the broadcasters' proposals in this proceeding, appears geared towards nullifying the effectiveness of Section 325(b)'s proscriptions. NAB's proposal to disallow damages is similarly eviscerating.[41]

In fact, many commenters, including EchoStar, agree with the Commission's proposal to require a shifting burden of proof, and urge the Commission to adopt rules which permit discovery of right as well as the liberal recovery of damages. ***First***, a shifting burden of

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38 Comments of BellSouth, 20; *see also* Comments of WCA, 5-11; Comments of LTVS, 8.

39 Comments of Local TV on Satellite, LLC at 8.

40 Comments of NAB, 30; Joint Comments of ABC et al., 28; Comments of Disney, 14-15.

41 Comments of NAB, 31.

proof is essential if the Commission is to effectively implement Section 325(b).[42] In particular, the Commission should make clear that a complaining party's *prima facie* showing will be made once it alleges a *per se* violation and supports this allegation by an affidavit. With respect to the factual questions of whether a broadcaster's demands are for different terms than those employed by other MVPDs and whether these differences are based on competitive marketplace considerations, the satellite carrier should be required to request all the necessary information from the broadcaster. As EchoStar argued in its comments, such a rule should parallel the Commission's current program access rules, which permit an aggrieved MVPD to request comparative rate information from a vendor. As under those rules, if the vendor does not provide the requested information, the MVPD may file a complaint based on information and belief, supported by an affidavit.[43] The Commission will then accept the complainant's rate allegations as true for purposes of a *prima facie* determination.[44] Similarly, since a broadcaster's attempted departure from the retransmission for carriage norm of the cable retransmission deals should be viewed as presumptively not based on competitive considerations, the satellite carrier's allegations, supported by an affidavit setting forth the carrier's information and belief, should be sufficient to establish the presumption. Consistent again with the program access rules, the burden should shift to the defendant broadcaster to prove one of the available competitive justifications.

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42 Comments of BellSouth, 25-26; Comments of WCA, 16-17; Comments of EchoStar, 21-23; Comments of DIRECTV, 18-19; Comments of U S WEST, 9.

43 *MVPD Order*, ¶ 126.

44 *Id.*

With respect to the appropriate remedies for violation of the bad faith prohibition, the NAB asserts that "[u]nder settled principles, the remedy for an alleged failure to bargain in good faith is simply a directive to engage in further bargaining."[45] Such a "remedy" is useless, as it would only allow further stalling and frustration of the congressional objective of bringing satellite local signals to consumers. Depending on the circumstances, the Commission should order the broadcaster that has been found to violate the bad faith prohibition to do more than just more bargaining – to reach an agreement that does not include any discriminatory terms not based on competitive marketplace considerations.

Furthermore, as the Commission has recognized in the program access area, it is appropriate to "compensat[e] . . . victims of clear-cut anti-competitive conduct which violates the program access rules. Restitution in the form of damages is an appropriate remedy to return improper gains obtained by vertically-integrated programmers to unjustly injured MVPDs."[46] Yet in establishing the availability of damages in the program access area, the Commission stated that damages would be appropriate in only limited circumstances. Specifically, the Commission stated that it would not impose damages where "a program access defendant relies upon a good faith interpretation of an ambiguous aspect of the program access provisions for which there is no guidance . . ."[47] The Commission also stated that "[w]here a violation is found,

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45 Comments of NAB, 31.

46 *In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd. 15822, ¶ 17 (1998).

47 *Id.*, ¶ 18.

the Cable Services Bureau ("Bureau") will indicate in its order whether the violation is the type for which the Commission will impose damages or forfeiture."[48]

Such limited damages are simply not a sufficient deterrent to violations of program access law – and will not be a sufficient deterrent to violations of retransmission consent law. Accordingly, the Commission should here ensure that its retransmission consent rules not only provide clear guidance in advance as to the nature and scope of a satellite broadcast station's obligations under Section 325(b), but also permit a satellite carrier to fully recover for each and every injury suffered at the hands of a television broadcast station that violates those obligations. Such a rule is both necessary to remedy the anti-competitive effect of any violation, but will also serve as a significant disincentive to violate the Commission's rules in the first place.

VI. CONCLUSION

For the foregoing reasons and those set forth in EchoStar's Comments, the Commission should promulgate concrete rules to implement the good faith and exclusive dealing provisions of the SHVIA.

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[48] *Id.*, ¶ 28.

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